

# Unanimous Consent Agreements Establishing a 60-Vote Threshold for Passage of Legislation in the Senate

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## Summary

The Senate frequently enters into unanimous consent agreements (sometimes referred to as “UC agreements” or “time agreements”) that establish procedures for the consideration of legislation that the Senate is considering or will soon consider. In recent practice, such unanimous consent agreements have sometimes included a provision that would require a 60-vote threshold to be met for amendments or legislation to be considered agreed to, rather than the simple majority ordinarily required. These amendments or measures may be of a controversial nature with the potential for causing a filibuster. By incorporating a 60-vote threshold, such UC agreements avoid the multiple requirements imposed by Senate Rule XXII for invoking cloture, while preserving the same requirement for super-majority support.

This report will be updated each session of Congress.

## Introduction

The Senate's emphasis on individual and minority rights, reflected in both its standing rules and chamber custom,<sup>1</sup> can make it challenging for the chamber to achieve its various goals in a timely manner. For this reason, the Senate routinely chooses to set aside its standing rules by unanimous consent.<sup>2</sup> This is done formally through UC agreements, which in many cases outline the terms under which specific legislation will be considered. Under recent practice, these UC agreements sometimes include a provision imposing a 60-vote requirement for approval of amendments or legislation, instead of the simple majority vote<sup>3</sup> ordinarily required in the Senate.<sup>4</sup> These amendments or measures are sometimes of a controversial nature with potential to be subjected to extended consideration or even a filibuster. By incorporating a 60-vote threshold, such UC agreements avoid the multiple requirements associated with Senate Rule XXII, both for invoking cloture and for consideration under cloture. Such UC agreements ensure that a measure will not be successful without the same level of super-majority support that would be required for cloture by stipulating that if the 60-vote threshold is not reached, the matter will be disposed of. As with all UC agreements, once agreed to, they can be altered only by the adoption of a further UC agreement.

## Function and Effects of Adopting a 60-Vote Requirement

Several possible effects could result from the Senate choosing to impose a 60-vote threshold for the passage of legislation. First, for cases in which a large majority of Senators is in favor of or opposed to the question, the time that would ordinarily be required to invoke cloture can be avoided. Once a cloture petition has been submitted, it must lay over until the second calendar day that the Senate is in session before a vote on cloture occurs. For a cloture vote to be successful, in most cases three-fifths of all Senators must vote in the affirmative (i.e., 60 votes if there are no vacancies).<sup>5</sup> If the cloture vote is successful, another 30 hours of consideration are in order before a vote on the underlying business must occur. Incorporating the 60-vote threshold into a UC agreement allows the Senate to bypass these time consuming requirements.

Second, for cases in which a large majority either in favor of or against the question cannot be assumed, the 60-vote threshold accomplishes the same purpose as a filibuster by preventing or delaying passage, but without requiring the Senate to engage in extended debate. Thus, surrendering the right to filibuster may be more palatable if Senators are confident a measure will not pass without super-majority support.

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<sup>1</sup> For information, see CRS Report RL30850, *Minority Rights and Senate Procedures*, by Judy Schneider.

<sup>2</sup> For information on UC agreements, see CRS Report RS20594, *How Unanimous Consent Agreements Regulate Senate Floor Action*, by Richard S. Beth.

<sup>3</sup> One half-plus-one of the members voting, assuming a quorum. Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101<sup>st</sup> Cong., 1<sup>st</sup> sess., S.Doc. 101-28 (Washington: GPO, 1992), p. 912.

<sup>4</sup> In the Senate, super-majority support is required, among other things, to suspend the rules, waive certain provisions of the Congressional Budget Act, make a bill a special order, postpone treaty consideration indefinitely, and invoke cloture. For information, see CRS Report 98-779, *Super-Majority Votes in the Senate*, by Walter J. Oleszek.

<sup>5</sup> For amendments to the standing rules of the Senate, two-thirds of Senators present and voting must agree. Senate Rule XXII. For information on cloture, see CRS Report 98-425, *Invoking Cloture in the Senate*, by Christopher M. Davis.

Another reason that a 60-vote threshold might be included in a UC agreement is that it presents Senators with an opportunity to vote directly on the underlying policy issue. Votes on cloture often fail and consequently a vote on the actual measure or amendment may never occur. The 60-vote threshold in a UC agreement has the effect of bypassing the procedural vote to grant Senators a direct vote on the policy issue at hand.

Lastly, in many of these 60-vote threshold UC agreements, it is a pair (or group) of amendments or measures that are jointly held to the 60-vote requirement. Many of the pairs (or groups) are competing options for the same policy issue. This allows the Senate to debate and choose between contending alternatives in a timely and controlled manner.

## Language, Variation, and Recent Increase in Frequency

Although examples of UC agreements placing a similar 60-vote threshold provisions can be found dating from at least the early 1990s, the practice has increased in frequency over the last four years.

Unanimous consent agreements that impose a 60-vote threshold may be agreed to at any time, either in advance, or during consideration. It is notable that unlike Senate rules requiring super majorities, which typically are framed in terms of a fraction either of the membership or those voting (e.g., two-thirds, three-fifths), these UC agreements explicitly state the number of votes required. Given that practices generally specify disposition for a question that achieves a majority vote, but not a super-majority vote imposed by unanimous consent, the language of these UC agreements typically provides for disposition of the amendment or measure if it fails to achieve the required 60 votes. Typically, the matter is withdrawn, but it could alternately be laid on the table or returned to the calendar. For example, in one UC agreement, the Senate agreed that “... two amendments be subject to a 60 affirmative vote threshold, and that if neither achieves that threshold, then it be withdrawn.”<sup>6</sup>

Unanimous consent agreements including a 60-vote threshold may be used not just to avoid the steps associated with invoking cloture, but also to avoid a separate vote on waiving a point of order raised under the Congressional Budget Act. In the Senate, most points of order under the Budget Act may be waived by a vote of at least three-fifths of all Senators duly chosen and sworn (60 votes if there are no vacancies).<sup>7</sup> In one UC agreement, the Senate agreed to a 60-vote threshold for the passage of a conference report stipulating that a vote on the waiving of a Budget Act point of order also be treated as a simultaneous vote on adoption.<sup>8</sup>

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<sup>6</sup> Sen. Barbara Boxer, remarks in the Senate, *Congressional Record*, daily edition, vol.154, April 17, 2008, p. S3109.

<sup>7</sup> For more information on points of order under the Congressional Budget Act, see CRS Report 97-865, *Points of Order in the Congressional Budget Process*, by James V. Saturno.

<sup>8</sup> Sen. Harry Reid, remarks in the Senate, *Congressional Record*, daily edition, vol. 155, February 13, 2009, p. S2288. “Mr. President, I ask unanimous consent that the Senate now proceed to the conference report to accompany H.R. 1, the American Recovery and Reinvestment Act, with the time until 5:30 for debate, with the time divided as follows: the majority controlling 30 minutes and the remaining time under the control of the Republican leader or his designee; that a budget point of order be in order and if raised against the conference report, then a motion to waive the applicable point of order be considered made; that at 5:30 p.m. the Senate then vote on the motion to waive the point of order; further, that the vote on the waiver of the point of order count as a vote on adoption of the conference report, with a 60-vote threshold ; that no further points of order be in order during the pendency of the conference report; and that upon adoption of the conference report, the motion to reconsider be laid on the table, with no further intervening action.”

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